Reply

SUPREME COURT OF THE UNITED STATES.

Filed Feb 17, 1899.

DARWIN C. ALLEN,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,

Defendant in Error.

Reply to Motion to Dismiss

EDWARD R. TAYLOR,

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Filed February ....., 1899.

..... Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1898.

DARWIN C. ALLEN,
Plaintiff in Error,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

Reply to Motion to Dismiss.

In its brief herein the defendant in error asks that the writ of error be dismissed on the grounds (1) that the writ was sued out too late—more than one year after the entry of the judgment, and (2) that the case under it presented no Federal question.

The first ground, having been unanticipated, was not referred to in the brief of plaintiff in error, and, by permission of the court, these pages are written in response, chiefly, to that first point of the brief of the defendant in error.

I.

The provisions of law regulating the time of taking out writs of error from this Court to State or United States courts existing at time of passage of Act of March 3, 1891, creating the Circuit Court of Appeals, were not repealed nor disturbed by that Act.

1. Writs of error from United States Supreme Court to State courts must be issued within same limitation of time as if directed to "a court of the United States."

Rev. Stat., Sec. 1003;
Cummings v. Jones, 104 U. S., 419.

2. At the time of the enactment of that statute "courts of the United States" subject to writs of error from this court were not numerous,[1]—the only courts of original general jurisdiction so subject being the District and Circuit courts. Hence, this court held the period of limitation for writs of error to State courts to be same as by Sec. 1008 of the Revised Statutes provided for such writs to District and Circuit courts.

Cummings v. Jones, 104 U. S., 419.

3. The limitation of time for issuance of writs of error from this court to a District or Circuit court is two years after entry of judgment.

Rev. Stat., Sec. 1008.

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[1]Now there are District and Circuit courts, with limitation for writ of error of two years (Rev. Stat 1008); Circuit Court of Appeals, one year (Sec 6, Act of March 3, 1891); Court of Claims, ninety days (Rev. Stat. 708); and "the United States courts in the Indian Territory," same as in District and Circuit courts (Sec. 13 Act of March 3, 1891.)

That section has not, nor has any of its provisions been repealed or qualified by the Act of March 3, 1891.

a. Writs of error from this court direct to District and Circuit courts are preserved or newly provided for in Sec. 5 of the Act of March 3, 1891.

b. There is no provision, expressed or to be implied, in the last mentioned Act touching the *time* within which a writ of error from this court to a District or Circuit court may issue.

Sec. 5 of that Act deals exclusively with the revisory jurisdiction of this court over District and Circuit courts, retaining the theretofore existing direct relation between these courts in certain designated classes of cases. It is silent as to *time* within which the writ of error may issue.

Sec. 6 of the Act deals exclusively with the revisory jurisdiction of the then newly created Circuit Court of Appeals—an appellate tribunal exclusively—and enumerates classes of cases in which the judgment of that court shall be "final." Then follows:

"In all cases not hereinbefore, *in this section*, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed One thousand dollars besides costs.

"But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

Surely, there is no uncertainty in those paragraphs? Nothing upon which to base a doubt that the "such" appeals and writs of error regulated by the last sentence

are the appeals and writs of error created in the immediately preceding sentence?

Of course, if the words, "But no such appeal," etc., of that last sentence of Sec. 6 of the Act of 1891, could be made to immediately follow Sec. 1003 of the Revised Statutes (as they are made to do in the defendant's brief), they might bear the meaning that brief urges be given them.

Cases originating in District and Circuit courts appear to be, by the Act of 1891, divided into three classes: first, those which may be disposed of finally in the Circuit Court of Appeals; second, those which the latter named court may entertain on their way to final review by this court; and third, those which pass by the Circuit Court of Appeals and submit themselves direct to this court. An examination of those cases show that they are so classified by the Act in the order of their importance. Of the two classes reaching this court the one involves but ordinary property rights, and the other capital crimes, construction of treaties and of constitutions, State and Federal. The first, coming here with the retouch of the Circuit Court of Appeals upon it, must start within the year; the second, coming here from the original mold, may begin its more dignified march in two years.

But, seriously, whether or not Congress purposely left Sec. 1008 untouched, untouched it surely is, and the limitation for issuance of writs of error to District and Circuit Courts is now, as heretofore, two years.

And without Sec. 1008 there would be no limitation to

issuance of writs of error from this court to the District or Circuit court.

THE FEDERAL QUESTIONS.

a. How presented and passed upon.

To support the judgment of the California courts here in review, it is absolutely essential that the plaintiff below owned, or had such vested interest in the lands which it purported to sell as legally enabled it to make the contracts of such sale in this action sought to be enforced. That was always conceded in the courts below, and in this argument we will assume it to be conceded here. The trial court declared that the lands "were part of the public domain of the United States and were granted to plaintiff" by the Act of July 27, 1866. That declaration of grant was, of course, but a conclusion of law based upon the "finding" of the court that the lands were odd numbered sections situated within thirty miles of plaintiff's railroad, were once withdrawn from, but afterwards restored to the public domain, that patents to them had not issued to plaintiff,[1] although it had applied for them, the applications being yet pending and not finally rejected. These facts fairly presented the question whether the railroad company had such vested interest in the lands as to authorize contracts for their conveyance, and this suit to enforce the performance of such contracts.

[1]In several pages of the brief of defendant in error appears an assertion that since the trial of this case patents had issued to the Railroad Company. We can no more concede the truth than we can the propriety of those assertions. Even if true they are impertinent to the case before this court; and if pertinent they are unwarrantably made, being *dehors* the record.

In its first decision (in favor of the defendant below) the California Supreme Court expressly declined to pass upon that question, the court saying: "The court found the plaintiff to be the owner in fee, and much nice reasoning is advanced for and against the finding. But under our interpretation of the contracts it is a matter irrelevant."

Record, p. ..., 40 Pac. Rep., 752-3.

In the final judgment the opinion of the court ignored all the Federal questions argued, but that judgment necessarily assumed, indeed, by the affirmance of the judgment of the trial court, impliedly declared that the plaintiff below was the owner in fee of the land.

b. The questions and their bases.

Upon the facts of the record that at the time of the execution of the contracts, and up to and including the rendition of judgment the title to the lands was in the United States, and that although within the railroad indemnity belt and once withdrawn from, they had thereafter been restored to, the public domain, and upon the legal implications from those facts arising we base our contention that

1. "There was drawn in question the validity of an authority exercised under the United States."

2. "A privilege or immunity claimed under . . . a statute . . . or authority exercised under the United States"; the decision being against the validity of the exercise of the authority in the first case, and against the

validity of the claim of privilege or immunity in the second.

The authority exercised under the United States is that of the Secretary of the Interior in restoring the lands to the public domain for private entry, and which restoration, we contend, had the effect (1) of freeing the lands from any right of resort thereto by the railroad company for indemnity, and (2) a final determination, within the terms and intendments of the contracts, that patents for those lands would not issue to that company.

The statute under which we claim immunity from the demands of the railroad company is the Act of Congress of July 27, 1866, which, we contend, gave the railroad company no right to, or at least no vested interest in, any lands of the indemnity belt until their selection under the direction of the Secretary of the Interior.

As to the requirement of Sec. 709 of the Revised Statutes that the privilege or immunity of the second class mentioned must be specially set up or claimed, we beg to suggest that the requirement was no more than the recital of a rule of pleading universally prevailing in the United States at the time of the passage of the Act, —— A. D. 1789. Where, under the reformed procedure prevailing in so-called Code States (of which California is one), such special pleas are not permitted, the law itself making the plea whenever the facts upon which it is based appeared in the case, the special plea requirement of the Federal statute is not applicable nor operative.

The judgment roll in this case contains a recital of the facts upon which the special pleas of privilege and im-

munity are based. Under the California procedure the California Supreme Court was bound by that recital as much as if specially set up in the pleadings; and this Court, taking the record and case from the California court, is bound by the same rule of pleading and procedure as was that court.

The word "immunity" in Sec. 709 of the Revised Statutes, bears, in popular understanding at least, a meaning as well negative as affirmative in freeing or protecting. And one resisting the demands of another purporting to be based on, say, a Federal statute, would, in that sense, be claiming immunity under that statute when seeking its judicial construction, antagonistic to that sought to be placed upon it by the demandant.

At any rate this court has held that a judgment of a State court sustaining the exercise of an authority by the Secretary of the Treasury (such as here shown by the Secretary of the Interior) was subject to review by this court, as involving a Federal question. The court said:

"The construction of the Acts of Congress, conferring power on the Secretary to do the acts complained of, were prominently drawn in question, and the decision below rejected the title set up *by maintaining the validity* of the Secretary's decision.

Maguire v. Tyler, 1 Black, 195, 203.

Respectfully submitted,

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